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NO. 95-855

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

GERALD D. BAIR, Director,
Iowa Department of Revenue and Finance,

Petitioner,

v.

THE BURLINGTON NORTHERN
RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARKANSAS, FLORIDA, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether an ad valorem tax on residential, commercial and industrial real property, manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and all property of centrally assessed utilities and transportation companies is subject to challenge under 49 U.S.C. § 11503(b)(4), and if so, does such an ad valorem tax discriminate against rail carriers;

(2) Is a valuation challenge adjudicating the true market value of railroad property pursuant to 49 U.S.C. § 11503(b)(1) governed by the burden of proof that would apply in a state proceeding involving the same matter.

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
I	INTEREST OF THE AMICI	1
II	SUMMARY OF ARGUMENT	3
III	ARGUMENT	5
A.	49 U.S.C. § 11503(b) Plainly Applies Only to Taxes Other Than Property Taxes.	5
B.	The Eighth Circuit's Conclusion That *ACF Industries* is "Inapposite" is Insupportable and Its Purposed Test to Determine What is a Discriminatory Tax is Iil-Defined.	9
C.	The Impact of the Eighth Circuit's Flawed Approach Extends Beyond Property Taxes	13
D.	The Potential Fiscal Impact of the Eighth Circuit's Decision Upon the States is Substantial.	14
E.	The Eighth Circuit Failed to Follow the Clear Language of the 4-R Act Dictating the Application of Iowa's Burden of Proof, Contrary to the Policy Behind the Statute.	16
IV	CONCLUSION	17

TABLE OF CASES

Page

Alabama Great Southern R. Co. v. Eagerton, 663 F.2d 1036 (11th Cir. 1981) 13

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 5

Atchison, Topeka & Santa Fe Ry. Co. v. Bair, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 456 U.S. 1071 (1984) 13

Atchison, Topeka & Santa Fe Ry. Co. v. Lennen, 732 F.2d 1495 (10th Cir. 1984) 16

Atchison, Topeka & Santa Fe Ry. Co. v. State of Arizona, No. 94-15850 (9th Cir., argued October 19, 1995) *on appeal from* CIV 93-549-PHX-RGS (D. Ariz. March 7, 1994) 14

Burlington Northern R. Co. v. Bair, 60 F.3d 410 (8th Cir. 1995) ..... passim

Burlington Northern R. Co. v. City of Superior, 932 F.2d 1185 (7th Cir. 1991) 13

Burlington Northern R. Co. v. Department of Rev., State of Washington, 23 F.3d 239 (9th Cir. 1994) ... 4,16

Burlington Northern R. Co. v. Huddleston, Civ. No. 95-8-472 (D. Colo. June 30, 1995), *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995) ... 11,13

Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 5

Burlington Northern R. Co. v. South Dakota Dep't of Rev., No. 94-3073 (D. S.D. June 26, 1995) 11

Burlington Northern R. Co. v. Wisconsin Dep't of Rev., 59 F.3d 55 (7th Cir. 1995) 4,8,9

CSX Transp., Inc. v. Tennessee State Bd. of Equalization, 801 F. Supp. 28 (M.D. Tenn 1992) 17

Department of Rev. of Oregon v. ACF Indus., Inc., 510 U.S. ___, 114 S. Ct. 843 (1994) ..... passim

Page

Kansas City Southern Ry. Co. v. McNamara, 817 F.2d 368 (5th Cir. 1987) 13

Ogilvie v. State Bd. of Equalization, State of N. Dakota, 893 F. Supp. 882 (D. N.D. 1995) 11

People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comm'rs, 196 N.Y. 39, 89 N.E. 581 (Ct. App. 1909) 3

Richmond, F. & P. R. Co. v. Department of Tax'n, 762 F.2d 375 (4th Cir. 1985) 13

Southern Ry. Co. v. State Bd. of Equalization, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 5

Union Carbide Corp. v. Board of Tax Comm'rs of the State of Indiana, 69 F.3d 1356 (7th Cir. 1995) 11

STATUTES

NEV. REV. STAT. §§ 361.227(5), 361.430 3

Railroad Reorganization and Regulatory Reform Act of 1976 (4-R Act) ..... passim

Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 5

Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 5

Section 306 5

Section 306(1)(d) 5,6

49 U.S.C. § 26c (1976) 5

49 U.S.C. § 11503 5,12

49 U.S.C. § 11503(a)(4) 4,10,13

49 U.S.C. § 11503(b) 6

49 U.S.C. § 11503(b)(1) 1,6,16

49 U.S.C. § 11503(b)(2) 6

49 U.S.C. § 11503(b)(3) 6,16

49 U.S.C. § 11503(b)(1)-(b)(3) ..... passim

49 U.S.C. § 11503(b)(4) ..... passim

49 U.S.C. § 11503(c) 16

WASH. REV. CODE § 84.40.0301 3

OTHER AUTHORITIES

ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS (1995 ed.) 2, 15

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, GOVERNMENT FINANCES: 1991-92 (PRELIMINARY REPORT) (1994) 2

INTERSTATE COMMERCE COMMISSION, 1993 ANNUAL REPORT 15

OFFICE OF ECONOMICS, INTERSTATE COMMERCE COMM'N, TRANSPORT STATISTICS IN THE U.S.: RAILROAD COMPANIES AND MOTOR CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT (Dec. 31, 1993) 2

SUP. CT. R. 37.5 1

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) 6

I

INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of the petitioner, Iowa, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment of that court in this matter, *Burlington Northern R. Co. v. Bair*, 60 F.3d 410 (8th Cir. 1995). The amici States fall within the jurisdictional boundaries of several of the federal circuits. Because this brief is submitted on behalf of Washington, Arkansas, Florida, Kansas, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Utah, Vermont and Virginia by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issues presented here are: (1) whether an ad valorem tax on residential, commercial and industrial real property, manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and all property of centrally assessed utilities and transportation companies is subject to challenge under 49 U.S.C. § 11503(b)(4), and if so, does such an ad valorem tax discriminate against rail carriers; and (2) is a valuation challenge adjudicating the true market value of railroad property pursuant to 49 U.S.C. § 11503(b)(1) governed by the burden of proof that would apply in a state proceeding involving the same matter.

The amici States are fifteen States within whose borders railroads carry on extensive transportation operations. The railroad transportation operations within the amici

States represent a significant presence in terms of property and personnel and a concomitant obligation on the part of state and local governments to provide essential services.[1] Ad valorem property taxes are an important part of the revenue systems of these States.[2] Similar to Iowa, the amici States, by constitutional provisions or statutory enactments, have removed certain property from ad valorem taxation for a number of reasons, including encouraging economic development and administrative efficiencies.[3] Also, several amici States, by the enactment of statutes or by judicial decision, apply a heightened burden of proof to tax-

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[1]For 1994, railroad net investment in road and equipment nationwide was reported to exceed $54 billion. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 42 (1995 ed.) For Class I line-haul railroads operating railroad mileage of 35,178 miles and railroad employment of 60,088 persons were assignable to the amici States. *Id.*, at 45, 57. Class I railroads, while comprising two percent of the nation's railroads, in 1994 generated 90% of freight revenues and accounted for 89% of railroad employment and 73% of mileage operated. *Id.*, at 3.

[2]For the fiscal year ended June 30, 1992, property taxes constituted 75% of all tax revenues collected nationwide for the support of local (as opposed to state) governments and other taxing districts. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, GOVERNMENT FINANCES: 1991-92 (PRELIMINARY REPORT) (1994), at 1. Property tax collections in the amici States during the same period for both state and local governments approximated $55.1 billion. *Id.* Information taken from ICC compilations for 1993 indicate that Class I line-haul railroads paid property taxes in the amount of $326,035,000. OFFICE OF ECONOMICS, INTERSTATE COMMERCE COMM'N, TRANSPORT STATISTICS IN THE U.S.: RAILROAD COMPANIES AND MOTOR CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT, Part I, Table 5, at 12 (Dec. 31, 1993).

[3]This Court in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843, 852 (1994), discussed several such constitutional provisions and statutes: "La.Const., Art. VII, § 21(F) (10-year exemption for any 'new manufacturing establishment or . . . addition to an existing manufacturing establishment'); Ore.Rev.Stat. § 285.597 (1991) (exemption for business property in an 'enterprise zone'); Va.Code. Ann. § 58.1-3661 (1991) (permitting any county, city or town to exempt from its property tax 'solar energy equipment, facilities or devices' and 'recycling equipment, facilities, or devices')."

payers, including railroads, challenging ad valorem property tax valuations.[4] Three of the amici States, Arkansas, Nebraska and North Dakota, are within the Eighth Circuit and are affected immediately by the decision below.

If the Eighth Circuit's interpretation of the 4-R Act were allowed to stand and were to be adopted by other circuits, the ability of the states in that Circuit, as well as states in other circuit's adopting the Eighth Circuit's interpretation, to structure their ad valorem property tax systems in a manner that best promotes sound tax policy judgments without suffering undue revenue losses will be seriously impeded. Of further concern is the potential for application of Eighth Circuit's interpretation of 49 U.S.C. § 11503(b)(4) to other sources of revenue relied on by the states. Finally, contrary to the intent and purpose of the 4-R Act, if the Eighth Circuit's decision on the burden of proof issue is not overturned, railroads in the Eighth Circuit, and any other circuit following its lead, will be treated more favorably than other taxpayers.

II

SUMMARY OF ARGUMENT

1. Under the decision below, ad valorem property tax systems are subject to challenge under 49 U.S.C. § 11503(b)(4)--the "another tax" provision of the 4-R Act. Subsection (b)(4), however, plainly does not apply to property taxes, which instead are regulated by the specific restric-

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[4] *See, e.g.*, NEV. REV. STAT. §§ 361.227(5), 361.430 (requiring "clear and satisfactory evidence"); WASH. REV. CODE § 84.40.0301 (requiring "clear, cogent and convincing evidence"); *People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comm'rs*, 196 N.Y. 39, 53, 89 N.E. 581 (Ct. App. 1909) ("a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair market value of the property assessed").

tions in subsections (b)(1)-(3). This Court's analysis in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843 (1994), supports the view that subsection (b)(4) does not apply to property taxes.

2. The court below also erred in concluding that Iowa's ad valorem property tax system is not generally applicable. When Iowa's taxation of property is considered in its entirety, Iowa taxes a comparable percentage of property as is taxed in Wisconsin (an ad valorem property tax system the Seventh Circuit in *Burlington Northern R. Co. v. Wisconsin Dep't of Rev.*, 59 F.3d 55 (7th Cir. 1995), held was generally applicable).

3. The court below also erred in finding *ACF Industries* "inapposite" because no basis exists to distinguish between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax. 49 U.S.C. § 11503(a)(4) simply speaks of property that is taxed, not which methods state legislatures must use to exclude property from taxation. Moreover, the court below applied an ill-defined "test" to determine that Iowa's ad valorem property tax system was discriminatory. Because the purported test is ill-defined, the Eighth Circuit provided little or no guidance to the states in fashioning non-discriminatory ad valorem tax systems or other tax systems governed by subsection (b)(4).

5. The court below, in contrast to the Ninth Circuit in *Burlington Northern R. Co. v. Department of Rev., State of Washington*, 23 F.3d 239 (9th Cir. 1994), failed to follow the plain language of the 4-R Act by refusing to apply the burden of proof that would have been applied had the plaintiff railroad brought its valuation challenge in state court.

6. This case presents several important issues of federal law upon which lower courts are divided.

III

ARGUMENT

A. 49 U.S.C. § 11503(b)(4) Plainly Applies Only to Taxes Other Than Property Taxes.

The Eighth Circuit below, without analysis, assumed that 49 U.S.C. § 11503(b)(4)[5] applies to property taxes. This Court has never held that subsection (b)(4) applies to property taxes. Moreover, as shown below, the Eighth Circuit's assumption is contrary to the plain language of subsection (b)(4) and conflicts with the analysis in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843 (1994), the only case in which this Court has interpreted subsection (b)(4).

"[T]he language employed by Congress" is the starting point in all cases of statutory construction and this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Here, subsection (b)(4), which prohibits the imposition of "another tax that

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[5]49 U.S.C. § 11503 is the recodification of § 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, first codified at 49 U.S.C. § 26c (1976). The original Act was recodified in 1978. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The texts of both § 11503 and § 306 are provided in the Appendix. The language of the recodification differs slightly from the original language of § 306. However, such changes "may not be construed as making a substantive change in the laws replaced." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Therefore, § 11503(b)(4) should be interpreted in light of the language of § 306(1)(d), and the two versions of the statute should be harmonized to the extent possible, with any unavoidable conflicts resolved in favor of the original language. *See, e.g., Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 523-24 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

discriminates against a rail carrier,"[6] follows in sequence subsections (b)(1)-(3), which prescribe discriminatory property taxes.[7] As used in subsection (b)(4), "another tax" is limited to a tax different or distinct from the ad valorem property tax restricted by the prohibitions of subsections (b)(1)-(3).

In the context of § 11503(b), the word "another" means "different or distinct from the one first named or considered[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (1971).[8] In subsection (b)(4), Congress intended to prohibit discriminatory taxes different or distinct from the property tax it had already addressed in subsections (b)(1)-(3). This plain reading of § 11503(b) comports with this Court's holding in *ACF Industries*.

In *ACF Industries*, Oregon argued that "[b]ecause subsections (b)(1)-(3) address property taxes and only property taxes, it follows that the term 'another tax' in subsection (b)(4) must mean 'a tax different from a property tax'" and that "subsection (b)(4) does not speak to discriminatory property tax exemptions for the simple reason that the provision does not speak to property taxes at all." 114 S. Ct. at 848.[9] The plaintiff Carlines, in contrast, argued that "the phrase 'another tax that discriminates against a rail carri-

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[6]Section 306(1)(d), the provision corresponding to § 11503(b)(4), prohibited "[t]he imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad" (emphasis added).

[7]Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.

[8]Similarly, in the context of § 306(1)(d), "other" means "different or distinct." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1971) defines "other" as "not being the one (as of two or more) first mentioned or of primary concern : . . . being the ones distinct from the one or those first mentioned or understood . . . not the same : DIFFERENT . . ."

[9]Unlike subsections (b)(1)-(3), subsection (b)(4) does not refer to "rail transportation property," but instead speaks of "disciminat[ion] against a rail carrier . . ."

er' [is] a residual category designed to reach any discriminatory state tax, including discriminatory property taxes, not covered by subsections (b)(1)-(3)." 114 S. Ct. at 848. According to the Carlines, "[i]f Congress had intended to exclude property taxes from the reach of (b)(4), . . . it would have drafted the provision to prohibit 'any tax other than a property tax,' and not phrased the statute as it did." 114 S. Ct. at 848. Finding either interpretation plausible in isolation, this Court nevertheless rejected the Carlines' reading of subsection (b)(4), concluding that "[t]he structure of § 11503 as a whole does yield an answer, one adverse to the Carlines' challenge to Oregon's property tax." 114 S. Ct. at 848.

In rejecting the Carlines' argument that subsection (b)(4) is "designed to reached any discriminatory state tax, including discriminatory property taxes," this Court first considered subsections (b)(1)-(3) and the definition of "commercial and industrial property" in § 11503(a)(4) and the interplay between these subsections. This Court concluded that subsection (b)(4) should not be read to prohibit that which subsections (b)(1)-(3), in conjunction with subsection (a)(4), allow. *See* 114 S. Ct. at 848.

This Court next discussed the meaning of the phrase "subject to a property tax levy," deciding that these words "must mean 'taxed property,'" rather than taxable property within the State's jurisdiction and power to tax. Thus, this Court concluded that railroads may not challenge property tax exemptions under subsections (b)(1)-(3) and that these subsections only prohibit discrimination between railroad property and taxed commercial and industrial property. *See* 114 S. Ct. at 849. This Court reasoned that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." 114 S. Ct. at 849. Thus, this Court held that the Carlines' reading of subsection (b)(4)--that the phrase "another tax that discriminates against a rail carrier" is designed to reach any discriminatory state tax, includ-

ing discriminatory property taxes--was "*untenable in light of § 11503 as a whole.*" 114 S. Ct. at 849 (emphasis added).

The Eighth Circuit below, contrary to *ACF Industries*, simply assumed that property tax challenges may be brought under subsection (b)(4). To make matters worse, in applying subsection (b)(4) the Eighth Circuit did not consider Iowa's actual ad valorem property tax system, but instead concocted a hypothetical tax different from the ad valorem property tax imposed by Iowa: "Iowa's scheme does not even impose a generally applicable tax on *personal* property." 60 F.3d at 413 (emphasis added). The Eighth Circuit's conclusion slighted the import of subsection (b)(4), prohibiting the imposition of "another *tax* that discriminates against a rail carrier" (emphasis added). This provision does not speak of "another component" or "another aspect" of a tax. Rather, the statutory language contemplates consideration of another tax as a whole. That is the approach to subsection (b)(4) taken in *ACF Industries*, shown by this Court's repeated references to "Oregon's ad valorem tax" and "Oregon's ad valorem property tax." *See, e.g.*, 114 S. Ct. at 846, 847, 848, 851-52. Never once did this Court consider Oregon's taxation of personal property apart from Oregon's taxation of real property.

Moreover, the Eighth Circuit's conclusion that Iowa's property tax is not generally applicable is erroneous. The test for "general applicability" used by the Seventh Circuit in *Burlington Northern R. Co. v. Wisconsin Dep't of Rev.*, 59 F.3d 55 (7th Cir. 1995), demonstrates that Iowa's ad valorem property tax is generally applicable. The test employed by the Seventh Circuit looked at the "percentage of the total tax levy that falls on railroads." 59 F.3d at 58 (footnote omitted). As shown in Iowa's Petition for Writ of Certiorari, railroads pay a small portion of the commercial and industrial ad valorem property tax in Iowa (less than 5 percent)

and an even smaller portion of the entire ad valorem property tax in Iowa (less than 1 percent).[10] These numbers are comparable to those for railroads in the State of Wisconsin. *See* 59 F.3d at 58. Because Iowa's ad valorem property tax is generally applicable, the Eighth Circuit erred in permitting the plaintiff railroad's challenge to Iowa's ad valorem property tax under subsection (b)(4), contrary to the plain language of subsecton (b)(4) and this Court's instruction in *ACF Industries*.

B. The Eighth Circuit's Conclusion That *ACF Industries* is "Inapposite" is Insupportable and Its Purported Test to Determine What is a Discriminatory Tax is Ill-Defined.

Even if property tax challenges were permitted under subsection (b)(4)--which they are not--the Eighth Circuit erred in finding Iowa's tax on railroad personal property discriminatory. The Eighth Circuit inexplicably limited this Court's reasoning in *ACF Industries* to exemptions, labeling as "specious" Iowa's "argu[ment] that a failure to tax non-railroad personal property is the equivalent of granting an exemption[.]" 60 F.3d at 412-13. However, it is the Eighth Circuit's distinction between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax

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[10]The calculations are derived as follows:

$$\frac{\text{\$541 million (assessed value of railroads)}}{\text{\$13 billion (assessed value of commercial and industrial property)}} = .0416$$

$$\frac{\text{\$541 million (assessed value of railroads)}}{\text{\$70 billion (assessed value of all taxable Iowa property)}} = .0077$$

See Pet. for Writ of Cert., at 6.

that is insupportable. This is demonstrated by the operative statutory language construed in *ACF Industries*.

In concluding that exemptions are not "discriminatory" under subsections (b)(1)-(3) and (b)(4), this Court in *ACF Industries* relied, in part, on the definition of "commercial and industrial property" in 49 U.S.C. § 11503(a)(4). This Court initially stated:

> "Commercial and industrial property," which serves as the comparison class for measuring discrimination under [subsections (b)(1)-(3)], is defined as "property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy" § 11503(a)(4).
>
> The interplay between subsections (b)(1)-(3) and the definition of "commercial and industrial property" in subsection (a)(4) is central to the interpretation of subsection (b)(4).

114 S. Ct. at 848. This Court then concluded that the phrase "subject to a property tax levy" means property that is *taxed*:

> Because property "subject to a property tax levy" means property that is taxed, the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which *discrimination* is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions.
>
> . . . [W]e must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3). *It would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4).*

114 S. Ct. at 849 (emphasis added).

As the operative statutory language, "subject to a property tax levy," focuses on "property that is taxed," the 4-R

Act simply does not distinguish between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax. Thus, the Eighth Circuit improperly elevated form over substance and erroneously held *ACF Industries* "inapposite." 60 F.3d at 413.[11]

The question of what constitutes "discrimination" under subsection (b)(4) has caused confusion in the lower courts, even after this Court's decision in *ACF Industries*.[12] The source of the confusion is that in contrast to the carefully drawn tests for discrimination in subsections (b)(1)-(3), no test is contained in subsection (b)(4). The subsection merely prohibits as "discriminatory" another tax that "discriminates" against rail carriers. Thus, to ascertain the meaning of "discriminates" in subsection (b)(4), one must examine § 11503 in its entirety or, more precisely, the tests for "discrimination" embodied in subsections (b)(1)-(3).

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[11]Indeed, Iowa's decision not to subject certain personal property to its ad valorem property tax simply results in that personal property being "exempt" from the tax, similar to the ad valorem tax systems in Oregon and Wisconsin.

[12]*Compare Union Carbide Corp. v. Board of Tax Comm'rs of the State of Indiana*, 69 F.3d 1356, 1359 (7th Cir. 1995) (dismissing subsection (b)(4) claim because "[t]hat Indiana uses the money it raises for a special purpose (subsidizing passenger rail transportation) rather than putting the revenues in its general fund does not turn an ad valorem tax into 'another' tax") *with Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995), *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995) (prohibiting under subsection (b)(4) the assessment of railroad computer software because the statutory exemption for computer software is available only to certain non-railroad taxpayers); *Ogilvie v. State Bd. of Equalization, State of N. Dakota*, 893 F. Supp. 882 (D. N.D. 1995) (prohibiting under subsection (b)(4) the assessment of railroad personal property); *Burlington Northern R. Co. v. South Dakota Dep't of Rev.*, No. 94-3073 (D. S.D. June 26, 1995) (prohibiting same).

That was the approach used by this Court in *ACF Industries*.[13]

In contrast, to determine whether Iowa had discriminated against the plaintiff railroad, the Eighth Circuit concocted a hypothetical tax by artificially limiting its analysis to Iowa's taxation of personal property. The Eighth Circuit simply ignored significant taxable property in Iowa (*e.g.*, all real property) while considering other property not subject to taxation (*e.g.*, personal property not subject to a property tax levy).[14]

The Eighth Circuit's purported "test" for discrimination is not tied in any way to § 11503. Rather, it is contrary

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[13]In *ACF Industries*, this Court contemplated that a tax imposed upon railroads alone or as part of an isolated and targeted group *might* result in "exemption discrimination" under subsection (b)(4). This Court stated:

> To begin with, this is not a case in which the railroads--either alone or as part of some isolated and targeted group--are the only commercial entities subject to an ad valorem property tax. Cf. *Burlington Northern R. Co. v. City of Superior*, 932 F.2d 1185 (CA7 1991) (occupation tax on owners and operators of "iron ore concentrates docks," in practical effect, applied only to docks owned by one particular rail carrier). If such a case were to arise, it might be incorrect to say that the State "exempted" the nontaxed property. Rather, one could say that the State had singled out railroad property for discriminatory treatment. See J. Hellerstein & W. Hellerstein, State and Local Taxation 973 (5th ed 1988)(the term "exemption" does not mean every exclusion from the reach of a levy, but rather exclusions of "property, persons, transactions . . . which are logically within the tax base"). On the record before us, Oregon's ad valorem property tax does not single out rail-road property in that manner, and we need not decide whether subsection (b)(4) would prohibit a tax of that nature.

114 S. Ct. at 851-52.

[14]In addition, the Eighth Circuit's statement that Iowa "leav[es] untaxed most of the personal property of every kind," 60 F.3d 413, strongly indicates that the court failed to consider that significant personal property in Iowa is taxed, including manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and the personal property of other centrally assessed utilities and transportation companies.

to the definition of "commercial and industrial property" in subsection (a)(4) which solely addresses property that is taxed, not which method state legislatures must use to exclude property from taxation. Finally, the court's approach--concocting a hypothetical tax--provides no articulable "test" that can be applied in subsequent cases. As such, the Eighth Circuit's approach is ill-defined.[15]

C. The Impact of the Eighth Circuit's Flawed Approach Extends Beyond Property Taxes.

If the Eighth Circuit's approach to subsection (b)(4) is adopted, its impact will extend well beyond the disruption of state property tax systems. This is because "another tax" in subsection (b)(4) has been applied to all types of non-property taxes. *E.g.*, *Richmond, F. & P. R. Co. v. Department of Tax'n*, 762 F.2d 375 (4th Cir. 1985) (applying subsection (b)(4) to corporate net income tax); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987) (applying subsection (b)(4) to transportation and communication utilities tax); *Burlington Northern R. Co. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991) (applying subsection (b)(4) to occupational tax); *Alabama Great Southern R. Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (applying subsection (b)(4) to franchise tax); *Atchison, Topeka & Santa Fe*

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[15]The district court in *Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995), *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995), took the Eighth Circuit's flawed approach even further. In that case, the plaintiff railroad claimed that the assessment of its computer software, which is exempt when held by certain other taxpayers, violated subsection (b)(4). The district court, in addressing whether the ad valorem property tax before it was not generally applicable (and, therefore, discriminatory) did not consider the property tax applied in Colorado. The district court instead, similar to the Eighth Circuit, concocted a hypothetical tax imposed *solely* on computer software. This tax, the district court found, "is a tax on an isolated and targeted group and is therefore discriminatory pursuant to § 11503(b)(4)." (Pet. for Writ of Cert., app. M, at 130a).

Ry. Co. v. Bair, 338 N.W.2d 338 (Iowa 1983) (applying subsection (b)(4) to special excise tax on consumed fuel), *cert denied*, 456 U.S. 1071 (1984).

The Eighth Circuit's ill-defined "test" easily could be used to find any number of exclusions from a tax base discriminatory, because it inappropriately restricts the comparison class for discrimination.[16] For example, assume that a state, to encourage manufacturers to move to the state, enacts a sales tax exemption for new construction for manufacturers. Since a railroad is not a manufacturer it is not entitled to the exemption, even if it were to construct a new maintenance shop. If the determination of the general applicability of the sales tax is artificially restricted to railroads and manufacturers or the taxation of new construction, the tax would be considered to be a tax on an isolated and targeted group and, therefore, discriminatory pursuant to subsection (b)(4). However, if the entire sales tax is considered, the appropriate conclusion would be that the tax is generally applicable and the exemption at issue would not be discriminatory under subsection (b)(4).

In sum, the flawed approach of the Eighth Circuit, if upheld, will impact more than ad valorem property taxes and, therefore, is of great concern to the states.

D. The Potential Fiscal Impact of the Eighth Circuit's Decision Upon the States is Substantial.

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[16] *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. State of Arizona*, No. 94-15850 (9th Cir., argued October 19, 1995) *on appeal from* CIV 93-549-PHX-RGS (D. Ariz. March 7, 1994) (see Pet. for Writ of Cert., app. L, at 115a-22a). In Arizona, the transaction privilege tax is imposed on entities engaging in business activities within 18 classifications, including 15 entities within the transportation classification. The plaintiff railroad's competitors (motor carriers) are subjected to a different tax scheme. Limiting the comparison class solely to the railroad's competitors, the district court held that the exemption available to motor carriers from the transaction privilege tax resulted in discrimination against railroads in violation of subsection (b)(4).

The Eighth Circuit immunized Burlington Northern from any taxes upon personal property it holds. In effect, the Eighth Circuit held that Congress intended to absolve railroads from the obligation to pay a significant portion of a tax of general applicability that traditionally has been used to fund the essential costs of state and local governments. Nationwide, recent railroad net investment has been estimated to exceed $38.4 billion, with operating revenues calculated at $27.5 billion.[17] Trackage within the country approximates 183,685 miles.[18]

A fairly recent railroad industry submission to this Court indicates that taxes paid upon such values by Class I railroads approach $281 million.[19] The potential consequences from the decision below for Eighth Circuit States are consistent with these nationwide totals. In addition to the possible property tax loss in Iowa, other affected Eighth Circuit States have at risk considerable amounts in property tax revenues. If the rationale of *Bair* were extended nationwide to immunize railroads from state and local income, sales and other taxes, the additional potential loss could be estimated conservatively at $70 million.[20]

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[17]INTERSTATE COMMERCE COMMISSION, 1993 ANNUAL REPORT, at 115. Totals shown are for Class I line-haul railroads. Under carrier classifications adopted by the ICC, Class I railroads are carriers with annual operating revenues in excess of an amount that is annually adjusted for inflation. In 1994, the revenue threshold was $255.9 million. Class I railroad systems represent less than three percent of railroads in the country but account for 90% of freight revenue. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 3 (1995 ed.)

[18]*Id.*, at 44.

[19]See Br. Amicus Curiae of Association of American Railroads at 14, *Chesapeake W. Ry. v. Tax Comm'r* (No. 91-1198).

[20]ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 16 (1995 ed.) Aggregate taxes paid by railroads in 1994 to state and local governments and to the federal government (other than for federal payroll and income taxes) exceeded $710 million.

E. The Eighth Circuit Failed to Follow the Clear Language of the 4-R Act Dictating the Application of Iowa's Burden of Proof, Contrary to the Policy Behind the Statute.

49 U.S.C. § 11503(c) provides: "The burden of proof in determining assessed value and true market value is governed by State law." The Ninth Circuit found this statutory language unequivocal in *Burlington Northern R. Co. v. Department of Rev., State of Washington*, 23 F.3d 239, 241 (9th Cir. 1994):

> "The burden of proof in determining assessed value and true market value is governed by state law." 49 U.S.C. § 11503(c). Under Washington law, the determination of the value of the property by public officials is presumed correct. RCW 84.40.0301(1). The presumption may be defeated only by evidence that is "clear, cogent and convincing." Id. The district court correctly applied this standard.

In contrast, the Eighth and Tenth Circuits have refused to follow particular state statutes applying to ad valorem property tax valuation challenges in favor of a general civil preponderance of the evidence standard. *See Bair*, 60 F.3d at 414; *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1500 n.4 (10th Cir. 1984). The Eighth Circuit's and Tenth Circuit's refusals to pay heed to the plain words of 49 U.S.C. § 11503(c) impacts the states in these jurisdictions and, if the reasoning of these circuits were adopted by other circuits, the applicable burden of proof in a number of other amici States also would be nullified.

The Eighth Circuit's and Tenth Circuit's misinterpretations of subsection (c) also is contrary to the policy of nondiscriminatory treatment reflected in the 4-R Act. Subsections (b)(1) and (b)(3) simply require that the assessment ratios and tax rates applied to railroad property not exceed those applied to commercial and industrial property and "subsection (b)(4) merely protects railroads from discrimi-

nation, rather than conferring on them a right to be treated like the most favorably treated taxpayer[.]" *ACF Industries*, 114 S. Ct. at 181 (Stevens, J., dissenting). *See also CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 801 F. Supp. 28, 35-36 (M.D. Tenn. 1992) ("Plaintiff wants this Court to mandate preferential treatment favoring it over similarly situated taxpayers, including other commercial and industrial taxpayers. The Federal Congress in enacting the 4-R Act did not intend such a result.") Thus, the Eighth Circuit, like the Tenth Circuit, erred in elevating railroads to a favorable status compared to other taxpayers, who are subject to the higher standard when challenging their ad valorem property tax valuations. This result is contrary to the 4-R Act's sound policy of equal and non-discriminatory treatment.

IV

CONCLUSION

This case presents several important issues of federal law upon which lower courts are divided. Therefore, this Court should grant Iowa's Petition for Writ of Certiorari.

DATED this 29th day of December, 1995.

Respectfully submitted,

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APPENDIX

49 U.S.C. § 11503

Tax discrimination against rail transportation property

(a) In this section--

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds

the tax ratio rate applicable to taxable property in the taxing district.

49 U.S.C. § 306

Prohibiting discriminatory tax treatment of transportation property

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that--

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed."